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SUPREME COURT, U.S.

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No. 05-989

IN THE

Supreme Court of the United States

DENNIS LEE HENDRIX, Individually and in his Official capacity as Sheriff of Forsyth County, EARL A. SINGLETARY, Individually and in his Official Capacity as Chief Deputy Sheriff of Forsyth County, DAVID W. WATERS, Individually and in his Official Capacity as a Deputy Sheriff of Forsyth County, PETITIONERS

v.

DANNY M. BENNETT AND DANNY L. REID

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

PAUL R. KOSTER
Counsel of Record
PHILLIP E. FRIDUSS
HALL, BOOTH,
SMITH & SLOVER, P.C.
1180 West Peachtree St,
N.W.
Atlantic Center Plaza,
Suite 900
Atlanta, Georgia 30309
(404) 954-5000
Attorneys for Petitioners

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 223-3160 ♦ USSCINFO.COM

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

COME NOW Petitioners and file this Reply Brief in Support of their Petition for Writ of Certiorari, showing this Honorable Court as follows:

Since the filing of the Petition for Writ of Certiorari in this case, the Second Circuit has, once again, clearly expressed that it has adopted the actual chilling test as the appropriate standard to apply when assessing whether a private citizen plaintiff has suffered an adverse action sufficient to support a First Amendment retaliation claim.

Specifically, in Ford v. Reynolds, the Second Circuit expressly noted that "[t]he allegation of a chill is indispensable" and "an essential element of a First Amendment retaliation claim" for "private plaintiffs." 167 Fed. Appx. 248, 250 (2d Cir. 2006) ("As to the First Amendment retaliation claim, a plaintiff must allege[, among other things,] the defendant's action effectively chilled the exercise of the plaintiff's First Amendment rights."); see also Fabich v. Custer, 2006 U.S. Dist. LEXIS 62673, at *6 (D. Conn. Sept. 5, 2006) ("[T]he plaintiff fails to address at all the defendants' argument that plaintiff has failed to demonstrate that the defendants' conduct chilled her speech. Therefore, the defendants are entitled to summary judgment on the plaintiff's First Amendment claim."); Woodmansee v. Mickens, 2006 U.S. Dist. LEXIS 24287, at *17 (D. Conn. Mar. 22, 2006) ("To prevail on this free speech claim, plaintiff must prove[, among other things,] defendants' actions effectively chilled the exercise of his First Amendment rights.") (citing Connell v. Signoracci, 153 F.3d 74, 79 (2d Cir. 1998)).

Likewise, the First Circuit also expressly adopted an actual chilling test to private citizen retaliation claims in Sullivan v. Carrick:

> To show a First Amendment violation in this context [plaintiff] must allege that his speech was in fact chilled or intimidated by [defendant's alleged retaliatory conduct].

888 F.2d 1, 4 (1st Cir. 1989) (emphasis added).

Respondents' suggestion that the First Circuit has not really established an actual chilling test in the private citizen context, (Resps' Br. at 15-16), simply ignores the express language of Sullivan. Indeed, since the filing of the Petition in this matter, Sullivan has, again, been cited within the First Circuit to require an actual chilling as a necessary element of a private citizen First Amendment retaliation claim. See, e.g., Royer v. Shea, 2006 U.S. Dist. LEXIS 33270, at *14 (D. Maine May 17, 2006) ("[Defendant's assertion that the amended complaint fails to allege any chilling effect on the plaintiff's exercise of his right to freedom of speech is correct. This omission is fatal. Sullivan v. Carrick, 888 F.2d 1, 4 (1st Cir. 1989) (plaintiff must allege that his speech was in fact chilled or intimidated by defendant's conduct); see also Singer v. Fulton County Sheriff, 63 F.3d 110, 120 (2d Cir. 1995) (failure to allege actual chilling of speech; plaintiff failed to plead a viable First Amendment claim).").

Moreover, Respondents' reliance on Nestor Colon Medina & Sucesores v. Custodio, 964 F.2d 32 (1st Cir. 1992) and Agosto-de-Feliciano v. Aponte-Roque, 889 F.2d 1209 (1st Cir. 1989), (Resps' Br. at 15-16), is misplaced as neither of those decisions involved a

private citizen retaliation claim, such as that at issue here. Cf. Nestor Colon, 964 F.2d at 40-41 (alleging retaliation in the form of denial of a public benefit); Agosto-de-Feliciano, 889 F.2d at 1213 (alleging retaliation based on government employee's political association). In fact, no First Circuit decision or any district court decision within the First Circuit has ever cited Nestor Colon or Agosto-de-Feliciano as support for an ordinary firmness test for private citizen retaliation claims.

For the foregoing reasons and those stated in the Petition for Writ of Certiorari, Petitioners respectfully maintain that certiorari is warranted.

Respectfully submitted,

PAUL R. KOSTER*
* *Counsel of Record*
DALEY, KOSTER & LAVALLEE, LLC
2849 Paces Ferry Road, Suite 160
Atlanta, Georgia 30339
(678) 213-2401

PHILLIP E. FRIDUSS
HALL, BOOTH, SMITH & SLOVER, P.C.
1180 West Peachtree Street, N.W.
Atlantic Center Plaza, Suite 900
Atlanta, Georgia 30309
(404) 954-5000

CHRISTOPHER D. BALCH
SWIFT, CURRIE, MCGHEE & HIERS, LLP
1355 Peachtree Street, N.E.
The Peachtree, Suite 300
Atlanta, Georgia 30309
Attorneys for Petitioners